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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 73-1233

NATIONAL LABOR RELATIONS BOARD AND PETER G. NASH, GENERAL COUNSEL,

Petitioners,

vs.

SEARS, ROEBUCK AND CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Respondent Sears, Roebuck and Co. hereby moves, pursuant to Supreme Court Rule 41(5), for leave to file the annexed supplemental brief. Oral argument was held in this case on January 14, 1975. Leave is sought in order to address *International Telephone and Telegraph Corporation* v. *Local 134, International Brotherhood of Electrical Workers,* ..... U. S. ....., 43 U. S. L. W. 4136 (Jan. 14, 1975); the amendments to the Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561, to take effect on February 19, 1975; and *Hawkes* v. *Internal Revenue Service,* ..... F. 2d ....., 75-1 USTC ¶ 9129 (6th Cir. Dec. 23, 1974). All of these pertinent matters were not available in time to have been included in Respondent's brief in chief. However, the *International Telephone and Tele-*

graph case and the amendments to the Act were discussed during the oral argument, the latter subject was also dealt with at some length in the Petitioners' reply brief (pp. 8-10); and the prior decision of the Sixth Circuit in *Hawkes* (467 F. 2d 787 (6th Cir. 1972)) was addressed in the Petitioners' principal brief (pp. 39-41, 43-44), Respondent's principal brief (pp. 12-13, 16 n. 21, 24) and Petitioners' reply brief (p. 7). Since each of these matters may, therefore, have some bearing on the Court's decision, Sears respectfully requests leave to file a supplemental brief in order to present its views.

Respectfully submitted,

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SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT

This supplemental brief on behalf of Respondent Sears, Roebuck and Co. is filed contingent upon the Court's granting the foregoing motion for leave to file a supplemental brief. The purpose of the brief is to address the new amendments to the Freedom of Information Act (Pub. L. No. 93-502, 88 Stat. 1561) to take effect on February 19, 1975; *International Telephone and Telegraph Corporation* v. *Local 134, International Brotherhood of Electrical Workers,* ..... U.S. ....., 43 U. S. L. W. 4136 (Jan. 14, 1975); and *Hawkes* v. *Internal Revenue Service,* ..... F. 2d ....., 75-1 USTC ¶ 9129 (6th Cir. Dec. 23, 1974).

1. Sears has argued that disclosure of Advice and Appeals memoranda is independently required by each of the sub-

sections of § 552(a)(2): that the memoranda are "final opinions . . . made in the adjudication of cases" under subsection (A) since they finally dispose of and "adjudicate" substantive rights before the General Counsel as a conceded independent agency within the meaning of the Act; that the memoranda may separately also be considered "statements of policy and interpretation . . . adopted by the agency" under subsection (B) since "adoption" does not require that the documents thereafter become binding precedents but, rather, as here, merely that they be "issued by the Agency or its delegates acting within their scope of authority" (*Tax Analysts and Advocate* v. *Internal Revenue Service*, 362 F. Supp. 1298, 1303 (D. D. C. 1973), *aff'd.* 505 F. 2d 350 (D. C. Cir. 1974)) and that finally, apart from the (A) and (B) contentions, the Advice and Appeals memoranda also constitute "administrative . . . instructions to staff that affect a member of the public" under subsection (C) since the "administrative" qualification was intended only to apply to information whose disclosure, in contrast to the documents here involved, "would significantly impede the [law] enforcement process" (*Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787, 795 (6th Cir. 1972); see also Sears' principal brief, p. 16, n. 21)). Even assuming *arguendo*, however, that each of these three (a)(2) contentions were rejected, Sears submits that disclosure is nevertheless required under § 552(a)(3), *i.e.*, the Advice and Appeals memoranda are "identifiable records" which are not precluded from disclosure under any of the exemptions of subsection (b). The exemptions are relevant only if subsection (a)(2) is first found to be inapplicable; if the memoranda are found to constitute substantive law under either (a)(2)(A), (B) or (C) then, necessarily, none of the exemptions would govern.

The validity of this approach is confirmed by the new amendments to the Act. In amending exemption (b)(7), for example, the Conference Report states that the exemption—and presumably the other exemptions as well—was not "intended to include records falling within the scope of subsection 552(a)

(2) of the Freedom of Information Act, such as administrative staff manuals and instructions to staff that affect a member of the public". Rep. No. 93-1380, 93rd Cong., 2d Sess., pp. 13-14. In short, if subsection (a)(2) applies, there is no need to look to any of the subsection (b) exemptions. The two subsections are mutually exclusive.[1]

2. *International Telephone and Telegraph* is relevant here only insofar as it clarifies the meaning of "adjudication" for purposes of subsection (a)(2)(A). Moreover, since Board decisions in section 10(k) proceedings under the Labor Act have always been a matter of public record notwithstanding that *International Telephone and Telegraph* concluded that such determinations were not an "adjudication" within the meaning of 5 U. S. C. § 551(7), that decision is of dubious assistance in resolving the instant disclosure controversy. In any event, Board 10(k) decisions are significantly different from the decisions of the General Counsel contained in Advice and Appeals memoranda. The former are merely "a preliminary administrative determination . . . an intermediate proceeding . . . [which has no] determinative consequences for the party to the proceeding . . . [and] binds no one". *International Telephone and Telegraph*, 43 U. S. L. W. at 4140, 4141. The disputed decisions in this case, by contrast, are a source of actual substantive law —the legal rationale of the General Counsel—which, to a great extent, govern labor relations in the United States. See, *e.g.*, Sears' principal brief, pp. 13-15, and the Appeals memorandum set forth in the appendix to the brief *amicus curiae* of the United

1. The amendment to exemption (b)(7) also nullifies the argument contained in the Petitioners' principal brief (p. 32) that, if exemption 7 is relevant, that exemption provides a blanket exemption for all documents contained in an investigatory file compiled for law enforcement purposes. The amendment now requires that a showing be made, in addition, that disclosure would actually interfere with enforcement proceedings or fall within other carefully delienated categories not applicable here. Congress also expanded the definition of "agency" (Sen. Rep. No. 93-1380, pp. 14-15) so as to include clearly the General Counsel; the General Counsel, as previously noted, however, has not disputed his status as an independent agency under the Administrative Procedure Act or the Information Act.

States Chamber of Commerce. They mainfestly are a final, frequently non appealable, disposition of rights by the Agency which binds and has determinative consequences for not only the particular parties involved but numerous other employers, unions and employees as well.

3. The Sixth Circuit's recent *Hawkes* opinion reemphasizes the test adopted by that Court and others, and urged here by Sears, with respect to the "administrative" limitation of subsection (a)(2)(C) and the scope of exemption (b)(2). The decision underscores that the limitation is "a very narrow one and is to be applied only where the sole effect of disclosure would be to enable law violators to escape detection." *Hawkes*, 75-1 USTC at pp. 86, 114. This is a far cry from the Petitioner's argument (principal br., pp. 42-44) that because the Advice and Appeals memoranda loosely "pertain to law enforcement matters" they are thereby outside the ambit of (a)(2)(C). The documents here at issue, to reiterate, essentially consist of the interpretation and application of legal principles, not tactical trial suggestions or prosecutorial techniques and procedures, whose disclosure would in no manner impair enforcement proceedings. An examination of the memoranda in the record, which were stipulated to be representative samples, firmly substantiates that conclusion. There has patently been no demonstration that the "sole effect", let alone *any* effect, "of disclosure would be to enable law violators to escape detection".

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